IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date:1.03.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.681 of 2006

and C.M.P.Nos.1 & 2 of 2006

Viswanathan
... Appellant/ Ist Defendant

Vs.

1. K.Arunagiri
2. V.K.Mahadevan
3. R.Dharmalingam
4. R.Sivakumar

... Respondents/ Plaintiffs1&2 and Defendants 2 & 3

PRAYER: Second Appeal against the Judgment and decree dated 20.09.2005 made in A.S.No.24 of 2004 on the file of the II Additional Subordinate Judge, Coimbatore confirming the judgement and decree dated 22.04.2004 made in O.S.No.947 of 2002 on the file of the III Additional District Munsif at Coimbatore.

For Petitioner : MS. P.T. Asha for
Ms.Sarvabhauman Associates
For Respondent R1&2 : Mr.R.Subramaniam
For Respondent R4 : Mr.Su.Srinivasan

J U D G M E N T

The first defendant in the Trial Court is the appellant and has filed the second appeal having suffered a decree in both the courts below. The plaintiffs, who are the respondents 1 and 2 herein have filed the suit for a permanent injunction against the defendants including the appellant herein from obstructing the plaintiffs from using the suit mud road to reach the property of the plaintiffs, situated on the Western side and also for an injunction from obliterating the mud road. The schedule to the plaint contains the plaint property has comprised in Survey Nos.160, 161, 162/1, 162/2, 183/A1, 183/B2 and 184.

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2. The first defendant has filed a written statement specifically stating that the plaintiffs are having alternative cart track through the third defendant's lands called Pallathottam comprised in Survey Nos.185 and 186 to reach the plaintiff's property situated in Survey No.183 and the first defendant has relied upon Ex.B.1 sale deed dated 22.11.1923. It was also the specific case of the first defendant that the plaintiffs have never used the passage from Vellakinar main road and the said passage was exclusively belonging to the first defendant.

3. It is also the admitted case of the plaintiffs that such alternate passage was in fact available but that reaches from Mettupalayam road upto the Railway track on the Eastern side and beyond that the vehicles cannot be carried. The courts below have also found that the first defendant as D.W.1 has admitted in his evidence that even though the East-west passage is running in his property, on the Northern side from Vellakinar main road running East-west, there is a barbed fence and it is on the Northern side of the said barbed wire fence the suit passage is situated. It was based on the said facts and evidence the courts below have come to the conclusion that the suit passage does not belong exclusively to the first defendant. Further, it was based on the evidence of the first defendant as D.W.1 the courts below have come to the conclusion that the suit passage does not exclusively belong to the first defendant. That apart, the Advocate Commissioner's report and the photographs marked as Ex.C1 to C3 has been relied upon by both the courts below to conclude that beyond the Railway line the vehicles cannot be carried, since the Railway track is elevated.

4. It is also found by both the courts below on evidence that the suit cart track has been in use not only by the plaintiffs and defendants but also public to reach from Vellakinar main road. Even though the learned counsel for the appellant would vehemently contend that the plea of easement of necessity has not been proved by the plaintiffs, Mr.R.Subramaniam, learned counsel appearing for the first and second respondents, who were the plaintiffs would state that it is the specific case of the plaintiffs that their land is locked by lands on three sides and the Railway track on the remaining one side. He would also submit that it is admitted by the first defendant as D.W.1 that even under Ex.B1, sale deed it is stated that the predecessors of the first defendant have used the East-west passage as common passage and even under Ex.B.2 partition deed dated 19.06.1965 the boundary clearly shows that there is an East-west passage and the same was admitted by the first defendant and he would submit that this has been dealt with by both the Trial Court as well as the appellate court extensively.

5. In any event, according to the learned counsel for the first and second respondents, these are the findings of fact and

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there was absolutely no substantial question of law involved in this case. While admitting the second appeal the following substantial questions of law were framed -

1) whether the courts below are correct in law in casting the burden upon the first defendant to prove his exclusive ownership of suit cart track totally over looking the fact that it is for respondents 1 and 2 as plaintiff's to prove their claim that the suit cart track is common to all?

2) whether the courts below are correct in law in directing the suit solely based on the report, plan and photographs of the Advocate Commissioner?

6. A perusal of the judgements by both the courts below show clearly as correctly pointed out by the learned counsel for the respondents 1 and 2 that it is not only on the basis of the report of the Advocate Commissioner marked as Ex.C1 to C3 wherein, it has been categorically stated that beyond the Railway line there was no possibility for anybody to carry the vehicles and therefore, the plea of alternate passage available to the plaintiffs as raised by the first defendant is not sustainable, but also on the admitted evidence of the first defendant as D.W.1, who has solely relied upon the sale deed dated 22.11.1923 marked as Ex.B.1 and Ex.B.2 partition deed dated 19.06.1965 the courts below have come to the conclusion that there is in existence, a common passage, which denotes the suit passage as such. When the plaintiff has specifically come forward with the pleading that except the suit passage there is no other alternative passage available to him for the reason that his land has been locked on three sides by various lands and on the other side Railway track and that plea has been proved not only by the Advocate Commissioner's report but also by the first defendant's evidence as D.W.1 and on the basis of Ex.B.1 and B.2 relied upon by the first defendant himself, there is no question of any further proof required since it is a case of easement of necessity.

7. In view of the above said facts, I do not think that the courts below have shifted the burden of proof on the first defendant. In view of the above said facts, there is absolutely no question of law involved in this case. There is one other circumstance also as found by the first appellate court stating that it is not only the plaintiffs and the defendants but also the public are using the said suit passage. It is not the case of the plaintiffs that the suit passage belong exclusively to them but on the other hand, it is the specific case of the first defendant that it belongs to him exclusively and which plea has been found against him by both the courts below on the basis of evidence and also documents Ex.B.1 and B2.

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8. In view of the same, there is absolutely nothing to be interfered with the decisions of both the courts below. The second appeal fails and the same is dismissed.

No costs. Consequently, the connected C.M.Ps. are closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nbj

To

1. The II Additional Subordinate Judge,
Coimbatore.

2.The III Additional District Munsif,
Coimbatore.

3. The Record Keeper,
Vr Section, High Court, Madras.

1 cc to M/s. Sarvabhuman Associates, Sr. 12561

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